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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-015102 01/17/2013

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

FORT MCDOWELL YAVAPAI NATION, et al. LEO R BEUS

v.

STEPTOE & JOHNSON L L P, et al. GARY L BIRNBAUM

JOHN DANIEL CAMPBELL

UNDER ADVISEMENT RULING

Two motions are under advisement following oral argument.

I. Motion to Exclude Untimely Disclosed Theories, Evidence and Witnesses.

The first is Defendants' September 25, 2012 Motion to Exclude Untimely Disclosed Theories, Evidence and Witnesses. This motion seeks to preclude Plaintiffs from pursuing a multi-million-dollar consequential damages claim based on untimely disclosure.

Plaintiffs filed this action in May 2010, alleging that Defendants – Plaintiffs' lawyers and appraisers – provided negligent advice/services with respect to certain loan transactions. As a result of Defendants' negligence, Plaintiffs allege, they made approximately $45 million in loans, which have now defaulted.

Until September 2012, Plaintiffs' damages theory was that it lost the millions that it loaned as a result of Defendants' negligence, and incurred incidental losses like attorneys' fees and other expenses. These damages were reflected in Plaintiffs' April 2012 "Final Supplemental Rule 26.1 Disclosure Statement." Under the then-scheduling order, initial expert opinions were due in July 2012.

In September 2012, Plaintiffs for the first time added a completely new damage theory: that, as a result of not having the loaned money, they lost the opportunity to invest in and build another casino that would have resulted in substantial profits.

Several things are clear about this new disclosure. First, it significantly changes the scope of this lawsuit. There is a big difference between a malpractice lawsuit that seeks compensation for money that was loaned and not repaid, and one that seeks in addition millions of dollars for loss of a business opportunity resulting from not having the funds to invest in it.

Second, it is untimely. Under Rule 26.1, Plaintiffs were obliged to disclose their measure of damages early in the case. Ariz. R. Civ. P. 26.1(a)(7). While a party seeking lost business opportunity damages might not know the exact amount of their damages at the outset of the litigation, Rule 26.1 requires that they at least disclose they are seeking such damages so that all parties can know the nature and scope of the litigation. Plaintiffs state that this new theory just "came to light," meaning that neither counsel nor their clients thought of it until recently. But they do not argue, nor could they, that lack of information or some other impediment prevented them from conceiving of this theory earlier. This is simply a matter of new theories being thought of over two years into the case.

The court has no indication that Plaintiffs intentionally delayed disclosure; it believes their statement that they only thought to assert these damages recently. But under Rule 26.1, each party has an affirmative obligation to think through their legal and factual theories and make timely disclosure of them.

Third, if the new theory is allowed, it will require additional discovery and will require that some already-completed discovery be redone. Predictably, Defendants' counsel represents that a huge amount of discovery will need to be redone and Plaintiffs' counsel represents that it will not be that much. Based on what the parties have submitted, the court believes that the new theory will require a substantial amount of *new* discovery, but that the amount of *repeat* discovery will be relatively small (relative, that is, to the already large amount of discovery in this case).

Fourth, trial has not been set. Under this court's practice, which is consistent with how the majority of Maricopa County judges manage their calendars, trial is not set until discovery is complete, the parties have participated in alternative dispute resolution, and dispositive motions have been resolved. The current dispositive motion deadline is April 29, 2013.

This case brings into sharp focus the tension, inherent in Rules 26.1 and Rule 37, between the policy favoring timely and diligent disclosure, and the policy against precluding relevant

evidence and theories. On the one hand, Plaintiffs were not diligent; there is no reason why they could not have decided to pursue a lost business claim sooner. And it is to some degree unfair that Defendants have spent over two years litigating this case only to have it change substantially late in the game. On the other hand, case law is clear that delay alone does not constitute prejudice and that prejudice is usually slight when trial has not been set. *See Zimmerman v. Shakman*, 204 Ariz. 231, 236, 62 P.3d 976, 981 (App. 2003).

The latter point, emphasized by the Court of Appeals in *Zimmerman* and the Supreme Court in *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 288, 896 P.2d 254, 258 (1995), can create a Catch-22 in courts that, like this one, set trial only when discovery is complete. Discovery deadlines are set to ensure that cases are promptly readied for trial, but the value of those deadlines is diminished if the absence of a trial setting negates any prejudice.

That said, *Zimmerman* is clear about what must be shown to preclude evidence for untimely disclosure. As the court there noted, "there is little reason to completely bar the use of evidence when no trial or case-dispositive motion is pending." 204 Ariz. at 236, 62 P.3d at 981. Because trial has not been set, the late disclosure in this case is harmless within the meaning of Rule 37(c) and as defined in the case law. Any prejudice resulting from the late disclosure can be cured by permitting, as Plaintiffs offer, the additional discovery necessary to address the newly disclosed claim. *See* Ariz. R. Civ. P. 37(c), State Bar Committee Note ("'Harmless' means the other party has a full and fair opportunity to investigate and rebut the new evidence."). There is no indication here that the late disclosure will prevent Defendants from investigating and rebutting the new theory, only that it will add time and expense to the resolution of this case.

IT IS ORDERED denying the Motion to Exclude Untimely Disclosed Theories, Evidence and Witnesses.

II. Motion to Exclude Use of, or Reference to, the Sworn Statement of Drew Ryce and Pearline Kirk for Failure to Make Timely Disclosure.

The second motion is Defendants' September 27, 2012 Motion to Exclude Use of, or Reference to, the Sworn Statement of Drew Ryce and Pearline Kirk for Failure to Make Timely Disclosure. The sworn statements of witnesses Ryce and Kirk were untimely disclosed, well over 30 days after Plaintiffs acquired that information. Ariz. R. Civ. P. 26.1(b)(2). Under Ariz. R. Civ. P. 37(c)(1), a party who fails to timely disclose information as required by Rule 26.1 may not use the evidence at trial unless the failure is harmless or good cause is shown.

Although Plaintiffs state that they were waiting until the sworn statements were signed before disclosing them, the disclosure rules do not permit them to wait. There is no reason why Defendants could not receive timely disclosure of the unedited statements, supplemented later by

the edited, signed statements. Thus, good cause does not exist to permit the statements to be used.

Nor was the late disclosure harmless. Defendants' pleadings describe the ways in which they were prejudiced by the late disclosure. Among other things, it was unfairly prejudicial to Defendants for the deposition of Nancy White (and others) to occur while Plaintiffs had the prior statements of Ryce and Kirk while Defendants did not. This is not a harm that can be cured by subsequent discovery. Moreover, because the court is excluding only the sworn statements and not the witnesses themselves, Plaintiffs will not be materially prejudiced.

IT IS ORDERED granting the Motion to Exclude Use of, or Reference to, the Sworn Statement of Drew Ryce and Pearline Kirk for Failure to Make Timely Disclosure. The sworn statements and any reference to them at trial are excluded.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.